IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

WP(C).No. 16185 of 2007(B)

OS.721/2006 of PRINCIPAL SUB COURT,ERNAKULAM
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PETITIONER:

A.K.PONNAMMA, W/O.K.P.MANILAL,
CC XVI/585, T & R CROSS ROAD, COCHIN 682 005.

BY ADV. SMT.T.D.RAJALAKSHMI
SRI.E.R.VENKATESWARAN

RESPONDENT:

T.R.SADANANDA BHAT, PARTNER,
GIRIPAI JEWELLERY, M.G.ROAD,
ERNAKULAM, COCHIN 682 035.
(S/O.V.RANGANATHA BHAT, KUDILIPARAMBIL HOUSE,
THAMMANAM POST, COCHIN 682 032.)

BY ADV. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

EXT. P1 PHOTOCOPY OF WRITTEN STATEMENT FILED BY THE 1ST DEFENDANT IN OS 721/06 OF SUB COURT, ERNAKULAM.

EXT.P2 PHOTOCOPY OF COUNTER AFFIDAVIT FILED BY THE IST RESPONDENT IN IA 8138/06 IN O.S. 721/06 OF SUB COURT, ERNAKULAM.

EXT.P3 PHOTOCOPY OF THE DEMAND NOTICE DT. 4.5.05 SENT BY THE PETITIONER.

EXT.P4 PHOTOCOPY OF THE REPLY NOTICE DTD. 20.6.06 SENT ON BEHALF OF GIRIPAI JEWELLERY.

EXT.P5 PHOTOCOPY OF DISSOLUTION OF PARTNERSHIP DT.20.11.04.

EXT.P6 PHOTOCOPY OF AGREEMENT DT.5.4.05 EXECUTED BY SUNDARESA PAI AND THE RESPONDENT.

EXT.P7 PHOTOCOPY OF PARTNERSHIP DEED DT. 7.4.05.

[True copy]

P.A. to Judge.

M.N. KRISHNAN, J.

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W.P.C. NO. 16185 OF 2007

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Dated this the 5th day of June, 2007.

J U D G M E N T

This writ petition is filed seeking to quash the order of the Sub Court, Ernakulam in I.A.8138/06. The suit was one for realisation of the amount due from the defendant and there was a prayer for attachment of the property under Order 38 Rule 5 which was passed by the Court, to start with and on appearance of parties and after hearing both sides the Court vacated the order of attachment and it is aggrieved by that decision the plaintiff has come up with the writ petition.

2. It is a settled position of law that in order to pass an order of attachment under Order 38 Rule 5, the Court has to prima facie consider regarding the case of the plaintiff and whether there is any chance for him to get a decree and whether there is any move by the defendants to transfer or do away with the property so as to defeat the enjoyment of the usufructs of the decree. If these conditions are satisfied, then alone the Court is competent to order interim attachment. This Court as well as the Apex Court have cautioned in so many cases that order of

attachment shall not be given as a matter of routine and it must satisfy the conscience of the Court that it is absolutely necessary in the case.

3. Admittedly, to start with, the property belonged to Sundaresa Pai as a proprietary concern in the year 1994. Subsequently, a partnership firm was constituted on 1-7-2001 under the name and style of Giri Pai Jewellery. Now, Ext.P5 is a dissolution deed dated 20.11.04. As per the said document the partnership firm Giri Pai Jewellery is terminated and dissolved. In Clause 2 of Ext.P5 it is specifically stated that the first partner Sri. Sundaresa Pai has taken over all the assets and liabilities of the partnership on the close of business on 29th day of November, 2004 including its firm name. So, Ext.P5 in so many crystal clear terms speaks about how the assets of the firm and the name of the firm has come into vest with Sundaresa Pai. Ext.P6 is an agreement entered into between Sadananda Bhat and this Sundaresa Pai on 5.4.2005. A reading of the entire body of Ext.P6 would reveal that what is transferred in favour of Sadananda Bhat who is the first defendant in this case is an exclusive right to use the firm name M/s Giri Pai Jewellery with effect from 5/4/2005 for a consideration of Rs.50,000/-. In clause 5 of Ext.P6, there is a clear recital to the effect that

Sundaresa Pai had undertaken that Sadananda Bhat shall not be held liable for any of the liabilities of the erstwhile partnership firm or the proprietary concern and that Sundaresa Pai shall alone be responsible for discharge of any existing liabilities. So a cumulative reading of Exts.P5 and P6 together will conclusively establish that what is transferred in favour of Sadananda Bhat is only the firm name and in the documents the rights and liabilities with respect to the assets of the erstwhile firm were kept in tact with Sundaresa Pai. Now, the suit is one for realisation of the amount due from this person. So, unless and until, one is prima facie able to establish that Sadananda Bhat has come into the assets of Sundaresa Pai he cannot be directed to wipe off the liability of him and furnish security for the amount due from Sundaresa Pai to the present plaintiff. It has also been argued that the right of the landlord has been sold under the Securitisation Act and the rights of the tenants had been surrendered and ultimately that building had come into possession of Sadananda Bhat and a partnership is constituted under Ext.P7. A reading of Exts.P5 to P7 would never show that the assets and liabilities of Sundaresa Pai has passed on to the Sadananda Bhat so as to make him liable for the amount due from Sundaresa Pai to the plaintiff. Then the larger question whether these transfers

were effected with intend to defeat or delay the creditors, or can be avoided u/s 53 of the Transfer of Property Act, are all matters which require larger consideration after adducing of evidence. There is also a contention that even the said claim is barred by limitation. So, I am satisfied at this stage that prima facie there is no arguable case so as to fix the liability on Sadananda Bhat and then direct him to furnish security for the amount due from Sundaresa Pai. So, the order passed by the learned Sub Judge does not suffer from any infirmity or illegality and therefore it is only liable to be confirmed. Hence, the writ petition lacks merit and it is dismissed. But, I make it very clear that the observations made by me in the judgment shall not be taken as a guideline when the matter is to be decided finally after adducing the evidence by both the parties or in other words, untrammelled by the observations made herein or by the order passed by the learned Sub Judge and the learned Sub Judge shall dispose of the case in accordance with law.

M.N. KRISHNAN, JUDGE.

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